



EMPLOYMENT TRIBUNALS

Claimant: Mr. N. Beckett

Respondent: Industrial Site Maintenance Ltd

FINAL HEARING

Heard at: Bury St Edmunds Employment Tribunal (in person)

On: 4 May 2022

Before: Employment Judge Mason
Mr. A Hayes
Mr. A. Chinn-Shaw

Appearances

For the Claimant: In Person

For the Respondent: Mr. T. Perry, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claim of discrimination arising from disability (s15 Equality Act 2010) fails and is dismissed.

REASONS

Background

1. The Claimant initially worked for the Respondent on an agency basis starting in November 2018 for 12 weeks. He became an employee on 21 March 2019 and his employment ended on 4 November 2019.
2. The Claimant contacted ACAS on 6 January 2020 and an Early conciliation Certificate was issued on 6 February 2020. The Claimant presented this claim on 27 February 2020.
3. The Claimant initially brought claims of unfair dismissal, race discrimination, disability, discrimination, sex discrimination and for holiday pay. The Respondent submitted a response on 31 March 2020 defending all claims and disputing that the Claimant was disabled (as defined in s6 Equality Act 2010 (EqA)).

4. On 27 September 2020, the Tribunal ordered (on the papers) the Claimant to provide medical evidence and a disability impact witness statement.
5. On 27 November 2020 the Claimant's GP, Danes Camp & Partners, completed a request for information and on 7 December 2020, the Claimant provided an impact witness statement and a further supplementary statement on 1 February 2021.
6. On 8 July 2021, EJ Alliot conducted an open preliminary hearing to determine whether the Claimant was disabled (as defined in s6 EqA). EJ Alliot concluded that the Claimant was disabled during the period March to November 2019 by reason of an injury to his left shoulder. EJ Alliot also made a deposit order.
7. EJ Alliot recorded that the Claimant had withdrawn his claim for holiday pay and noted that there were no claims in respect of unfair dismissal (due to lack of service) or race and sex discrimination. EJ Alliot then identified the issues and listed the final hearing for 13 and 14 January 2022.
8. On 19 August 2021, the Claimant paid the deposit.
9. The first day of the scheduled final hearing (13 January 2022) was converted to a case management hearing and was conducted by EJ Welch. The Claimant confirmed that his claims in respect of unfair dismissal, sex and race discrimination were withdrawn and EJ Welch issued a judgment formally dismissing those claims on withdrawal and noting that the only claim proceeding to a full hearing was disability discrimination.
10. The final hearing was relisted to take place on 1 April 2022 and then postponed to today on the Respondent's application due to insufficient notice.

The issues

11. As previously identified by EJ Alliot, the issues are as follows:
 - 11.1 Did the following arise in consequence of the Claimant's disability:
 - (a) Being taken off recycling duties and being put on light duties?
 - 11.2 Did the Respondent treat the Claimant unfavourably as follows:
 - (a) When taking days off work after his second fall on 9 June 2019, not being paid his full pay and being told to take the day off as holiday;
 - (b) Being denied access to proper advisors in the disciplinary hearing held on 27 October 2019?
 - 11.3 Did the Respondent treat the Claimant unfavourably in any of those ways because of that thing?
 - 11.4 If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
 - 11.5 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?
12. Mr. Perry agreed that 11.4 is not relevant as the Respondent has not pleaded "legitimate aim" defence.

Procedure at the Hearing

13. The Respondent provided a bundle of documents (161 pages) which the Claimant had access to. Any reference to a page number in this Judgment is to the relevant page number in the bundle.
14. At the outset we reminded the parties of the issues identified by EJ Allott. The Claimant told us he accepts that the only disability impairment is his left shoulder injury, the injury to his ankle being “only a sprain”
15. The Tribunal adjourned for an hour to read the papers and the witness statements. We then heard from the Claimant who confirmed his witness statement and was cross-examined by Mr. Perry. After a break for lunch, we heard from the Respondent’s witnesses - Mr. Tate (Service Delivery Manager and the Claimant’s former Line Manager) and Ms. Guthrie (Finance Manager).
16. At the conclusion of the evidence both Mr. Perry and the Claimant made brief verbal submissions. Due to lack of time, the Tribunal then reserved its decision which we now give with reasons.

Relevant Law

17. **S6 EqA**
*“(1) A person (P) has a disability if –
(a) P has a physical or mental impairment; and
(b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities”*
18. **s15 EqA:**
*“15 Discrimination arising from disability
(1) A person (A) discriminates against as disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B’s disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection 1 does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”*
19. We have considered the relevant case law specifically *Sheikholeslami v University of Edinburgh [2018] IRLR 1090*,; *iForce Ltd v Wood UKEAT/0167/18 (3 January 2019, unreported)*; *Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893*; *Pnaiser v NHS England [2016] IRLR 170*, *Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305*. From this case law, we draw the following guidance:
 - 19.1. The proper construction on s15(a) requires an investigation of two distinct causative issues:
 - (i) Did A treat the Claimant unfavourably because of an (identified) “something”? Motive is irrelevant but the “something” must have operated on the mind of the decision-maker and requires an examination of the putative discriminator’s state

of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. There has to be some connection between the “something” and the Claimant’s disability; if disability was a significant influence or an effective cause of the unfavourable treatment, then this test is satisfied.

(ii) Did that “something” arise from the Claimant’s disability?

19.2 It does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment.”

Findings of Fact

20. Having considered all the evidence, we have unanimously made the following findings of fact.
21. In May 2017, before he joined the Respondent, the Claimant sustained a shoulder injury.
22. In November 2018, the Claimant started working for the Respondent on an agency basis. On 21 March 2019, he became an employee. His role was Hygiene & Recycling Operative. He declared his shoulder injury on a New Starter Form (p84-86).
23. Terms and Conditions of his employment provide that in the event of sickness, he would be paid Statutory Sick Pay (SSP) after the 4th day of absence; any enhancement is entirely at the Respondent’s discretion.
24. In January 2019, the Claimant says he slipped at worked and sprained his ankle. The Respondent cannot confirm or deny this and say they have no record of this as he was an agency worker at the time. On the balance of probabilities, we accept the Claimant’s evidence on this point.
25. On 9 June 2019, the Claimant again slipped in the yard at work and again sprained his ankle. This was reported in the Accident Report Book (p91) which records “*swollen ankle*” and an Accident/Incident/Near Miss Investigation Form (p93) refers to “*twisted my left ankle*”. His shoulder is not mentioned in these documents and the Claimant said in evidence he had not noticed any deterioration in his shoulder when these documents were completed.
26. He was off work until 13 June 2019 and paid in full during that period of absence.
27. He subsequently took time off work at various times in June, July and August because of his ankle. A Return to Work Form dated 19 July 2019 completed by Mr. Tate in the presence of the Claimant (p105-107) states reason for absence as “Recurring ankle injury”; it does not mention the Claimant’s shoulder.
28. On 29 July 2019, a Statement of Fitness for Work (p109) shows the Claimant was signed off work for 5 days because of “*Ankle sprain*”; there is no mention of his shoulder.

29. The Claimant says he was told by the Respondent to take some of the time off as annual leave rather than sickness absence as he would otherwise only be paid SSP. The Respondent denies this and says it was the Claimant's choice to take time off as holiday - he was not instructed to do so. On balance, we prefer the Respondent's evidence on this point and find that no matter which party raised this as a possibility, it was ultimately the Claimant's choice.
30. On 5 August 2019, the Claimant met with his Manager, Mr. Tate, and agreed a Workplace Adjustment Plan (p110-112). This was completed by Mr. Tate and signed by the Claimant. This shows:
- 30.1 Box 1: *"Consider and identify what health condition/disability behaviours are that may require workplace adjustments"*
Response: *"Injured ankle from incident in yard..."*
- 30.2 Box 2: *"Discuss how the above effects/may affect their ability to undertake their role effectively"*
Response: *"For the next couple of months my ankle can suddenly give up meaning I am unable to walk"*
- 30.3 Box 3b: *"Identify what workplace adjustment could be considered to help them perform effectively"*
Response: *"Lighter duties, avoid upper Mez (mezzanine) levels to avoid using stairs"*
31. The Claimant said in cross-examination that the reason he was given alternative duties was because of his shoulder, not his ankle. We do not accept this and prefer Mr. Tate's evidence that the adjustments were made solely because of the Claimant's ankle injury. There is no mention of his shoulder in the Workplace Adjustment Plan which he signed on 5 August 2019 thereby confirming it was *"an accurate record of the conversation held"*. In his own claim form the Claimant refers only to his ankle injury and says *"On return to work asked manager to get someone else to work in the yard"*.
32. The Claimant said in evidence that follow-up review meetings and seven return to work meetings were not held and that these meetings would have been his opportunity to mention his shoulder. However, the Claimant had other opportunities which he did not take to mention his shoulder such as on 23 August 2019 when he met with Mr Tate and raised a number of complaints regarding the state of the site but did not mention his shoulder injury (p114). Furthermore, on 6 September 2019, he submitted his complaints in writing (p116-117); these run to 25 complaints; again, he does not mention his shoulder injury nor at a meeting on the same day to discuss these complaints with Mr. Tate and Ms. Claire King (National Operations Manager).
33. On 26 September 2019, the Claimant called Head Office and asked for his holiday to be "paid back" as he had been "forced" to take it whilst off sick (p120). Notes (p120) show that again he raised concerns about the state of the site but did not mention his shoulder.
34. On 21 October 2019, the Claimant telephoned and spoke to Mr. Tate. Mr. Tate says the Claimant was aggressive and that his conduct was unreasonable and threatening. The Claimant denies this. There was no mention in that conversation of the Claimant's shoulder and/or adjustments to his duties. When the Claimant reported for work later that day he was suspended and escorted off the premises.

35. On 23 October 2019, the Respondent wrote to the Claimant (p125-126) notifying him that he was required to attend a disciplinary hearing to be held on 27 October 2019 due to his alleged gross misconduct, specifically threatening behaviour toward his line manager. The Claimant is advised in the letter that he has the right to be accompanied at the hearing by either an ISM work colleague or an accredited trade union representative.
36. The disciplinary hearing duly started on 27 October 2019, but in light of the Claimant's request for more time to arrange a disability representative, it was postponed for 24 hours to 28 October 2019 (notes p128-133)
37. The meeting was chaired by Mr. Ben Brocklehurst (Service Delivery Manager); Mr. Tate attended in the role of note-taker. The Claimant objected to Mr. Tate being present as he was also the complainant; Mr. Brocklehurst refused to remove Mr. Tate and assured the Claimant Mr. Tate would play no part in the hearing.
38. The Claimant was not represented. At the conclusion of the disciplinary hearing, the notes show (p133) that Mr. Brocklehurst advised the Claimant that he would accept the Claimant's resignation if it was offered and the Claimant said "*I accept*". The Claimant told us that he did not resign and that this is incorrect. We prefer the Respondent's version of events as the Claimant himself states in his claim form that he handed in his notice.
39. On 1 November 2019, Mr. Brocklehurst wrote to the Claimant to say he was willing to consider allowing the Claimant to withdraw his notice (p134). There then follows some confused communications between the parties but it is not in dispute that the Claimant did not withdraw his notice and the parties agree that his employment came to an end on 4 November 2019 .
40. On 27 February 2020 the Claimant presented this claim. There is no mention of his shoulder injury in his claim form and the focus is entirely on his ankle injury.

Submissions

41. The Claimant made brief verbal submissions as follows:
 - 41.1 Following the fall in the yard, he had concerns about his shoulder. He was placed on different duties because of his shoulder.
 - 41.2 The Respondent failed to hold seven Return to Work Meetings. At the disciplinary hearing he was not represented and there was no opportunity to have a colleague present. The notes are incomplete and misleading.
42. Mr. Perry, on behalf of the Respondent, made the following verbal submissions:
 - 42.1 The Claimant's ankle injury is not a disability. The only impairment which is a disability is his shoulder injury. He mentioned his shoulder on the New Joiner Form but did not request any adjustments and did not mention it again.
 - 42.2 The Claimant was taken off recycling duties because of his ankle injury and not because of his shoulder. He had a number of opportunities to mention his shoulder and failed to do so. So the Claimant fails at the first hurdle.
 - 42.3 In any event, there is no causal link between the Claimant's allegations that he was not paid full pay when off sick, that he was told to take the day off as holiday or that he was denied access to proper advisors at the disciplinary hearing.

42.4 This claim is misconceived and should be dismissed.

Conclusions

43. Applying the relevant law to the findings of fact to determine the issues, we have unanimously reached the following conclusions.
44. We must first determine whether being taken off recycling duties and put on light (or alternative) duties was “something arising” because of the Claimant’s disability. We have concluded that it was not for the following reasons:
- 44.1 It is not in dispute that the Claimant was disabled only by reason of his shoulder and not his ankle injury.
- 44.2 We have found that he was taken off recycling duties and put on light duties (or alternative duties) solely because of his ankle.
- 44.3 Therefore the “something arising” was not because of his disability.
45. In view of this it is not necessary to consider the second limb of the s15 test but we have gone on to do so and have concluded that, in any event, the Respondent did not treat the Claimant unfavourably because he had been taken off recycling duties and given alternative duties.
- 45.1 The Claimant’s contractual entitlement to sick pay was SSP only other than at the Respondent’s discretion. We cannot find any evidence to support a conclusion that by only paying full sick pay up to 13 June and thereafter SSP, the Respondent was treating the Claimant unfavourably.
- 45.2 We have not accepted the Claimant’s case that he was told to take sick days off as holiday and have found that this was his election and therefore cannot amount to unfavourable treatment.
- 45.3 We accept he was effectively denied access to proper advisors at the disciplinary hearing. However, we do not accept that there is a link between this and the fact the Claimant had been taken off recycling duties and put on light duties.
46. The Claimant’s claim of disability discrimination therefore fails and is dismissed. We do however have some sympathy for the Claimant. Whilst this claim was misconceived, it is apparent that the disciplinary process was flawed in significant respects. The Claimant was given insufficient notice to arrange a suitable representative and Mr. Tate should not have been present as note-taker. These failings undoubtedly added to the Claimant’s sense of injustice.

EJ Mason
8 May 2022

Sent to the parties on:
16 May 2022

For the Tribunal Office: